

THE DIVISION OF POWERS

1 - What is the Division of Powers?

The division of powers is a concept that describes **how the power to make laws is divided** between the Commonwealth Government (also called the Federal Government) and the State and Territory governments around Australia.

Before 1901, the States had their own Parliaments that passed their own laws. They also had their own courts, government authorities like police, and departments responsible for things like education and trade.

When the existing six States formed a Federation in 1901, Section 51 of the Australian Constitution gave the Commonwealth Government “heads of power” to make law about certain things.

The Commonwealth Government may only make laws relating to the heads of power contained in s51 of the Australian Constitution.

However, the States remain free to make laws about any topic as long they do not conflict with a law of the Commonwealth Government.

The State Constitutions in Australia give the power to make any law for the peace, order or welfare, and good government of the State. There are 10 Territories that are part of the Commonwealth – only the Australian Capital Territory, the Northern Territory and Norfolk Island make their own laws.

What are some of the “heads of power” in the Australian Constitution?



Lighthouses



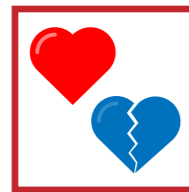
Tax and Trade



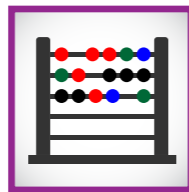
Defence



Corporations



Marriage & Divorce



Census & Statistics

2 - The Rule of Law & Division of Powers

The rule of law requires that the use of power is controlled by law. The division of powers is an important concept in understanding how power is controlled – the Commonwealth Government’s power to make law is limited by s51 of the Australian Constitution. State governments’ powers to make laws is limited by s109 of the Australian Constitution.

3 - Conflicts Between State & Commonwealth Law

Section 109 of the Australian Constitution was written to sort out what happens when a law of the Commonwealth and a State conflict.

If a Commonwealth law said the following:

The relevant local government authority shall cause a lighthouse to be built and operated every fifty kilometres along the coast.

And the State law said:

The relevant local government authority shall cause a lighthouse to be built and operated every fifty kilometres along the coast in areas of high population density, and every eighty kilometres otherwise.

The law of the State could be struck down by the High Court.

If this happened, only the part of the State law that conflicts with the Commonwealth law would be struck down:

The relevant local government authority shall cause a lighthouse to be built and operated every fifty kilometres along the coast in areas of high population density, and every eighty kilometres otherwise.

4 - What Happens If The Law Of A Territory Conflicts With Commonwealth Law?

The Australian Capital Territory (ACT)

In the ACT, Section 28 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* does not allow laws that are inconsistent with Commonwealth Law to have any effect. Laws which have “no effect” are still laws, but cannot be used – whereas a law found invalid under Section 109 of the Australian Constitution is invalid and no longer a law.

In 2013, the Legislative Assembly for the Australian Capital Territory passed a law legalising same-sex marriage. The Commonwealth Government challenged *Marriage Equality (Same Sex) Act 2013 (ACT)* in the High Court, and argued that it had no effect because it was inconsistent with the *Marriage Act 1961 (Cth)*. The High Court agreed with the Commonwealth, and the ACT law was declared to have no effect.

The years below show the first year that an elected state or territory parliament could make its own laws



Queensland



Victoria



New South Wales



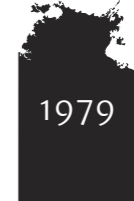
Tasmania



South Australia



Western Australia



The Northern Territory



The Australian Capital Territory

“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

Section 109 of the Australian Constitution